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In The

Supreme Court of the United States

October Term, 1972

72-992

No. .....

EDWARD THOMAS MURRAY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above entitled case on October 18, 1972.

CITATION TO OPINION BELOW

The decision of the trial court (TR Vol. II, pp. 382,383) is unreported and is printed in Appendix B hereto, *infra,* p. App. 1. The judgment of the Supreme Court of Virginia rendered without opinion, is unreported and is printed in Appendix B hereto, *infra,* p. App. 2.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on October 18, 1972 (Appendix B, *infra* p. App. 2). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether, in the light of the underlying principles evident in this Court's holding in *Jencks* v. *United States,* 353 U.S. 657 (1957), and the principles stated in *Brady* v. *Maryland,* 373 U.S. 83 (1963), the denial of defendant's motion for the production of prior statements of prosecution witnesses for use in cross-examination and for impeachment of those witnesses at trial is a violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case arises under Section 1 of the Fourteenth Amendment to the Constitution of the United States set forth in full in Appendix A hereto.

STATEMENT OF THE CASE

Petitioner was tried in the Corporation Court of the City of Norfolk, Virginia upon an indictment for murder in the first degree upon a plea of not guilty and requested a trial by jury (TR 4).

Petitioner is accused of the murder of one Laura Clemons who died of a single gunshot wound (TR 10; 40). A small, sharp steak knife (Commonwealth's Exhibit 10) was found by police officers at the right foot of the deceased (TR 40; Commonwealth's Exhibits 4 and 5; TR 41, 54). The knife and the floor near the knife had blood stains on them (Commonwealth's Exhibits 5 and 10; TR 60, 61, 234).

Petitioner claimed that he was being attacked by the deceased with the steak knife and that he shot her in self defense (TR 269-273; 333).

Witnesses for the Commonwealth denied seeing a knife in the hands of the deceased at any time (TR 99, 101; 140, 141). Of the four (4) eyewitnesses called by the Commonwealth, only two (2) were in a position to see whether the deceased had, and was attempting to use, a knife at the time of the shooting (TR 173, 174; 210, 211; 97, 98, 99; 120; 140). Both of these witnesses were questioned first by police officers shortly after the incident, and then again later. At the later questioning, their statements were taken down stenographically and recorded by police (TR 82-84; 123). During the cross-examination of these witnesses, Counsel for Petitioner called for the production of these statements so that they might be used in cross-examination of the witnesses. In both instances, the motion was denied by the Trial Court (TR 83, 84; 125; Appendix C, *infra,* p. App. 3).

At the close of the evidence, the case was submitted to the jury and the jury returned a verdict of guilty of murder in the second degree, fixing Petitioner's punishment at ten (10) years in the State penitentiary (TR 382). The Court promptly entered judgment on the verdict (TR 382, 383).

Petitioner filed a timely Notice of Appeal and Assignment of Error and petitioned the Supreme Court of Virgina for an Appeal and Supersedeas. By Order entered October 18, 1972, the Supreme Court of Virginia rejected the Petition and refused to grant an appeal, the effect of which was to affirm the judgment of the trial court (Appendix B, *infra,* p. App. 2).

The federal questions sought to be reviewed here were raised in the trial court by the oral motion of Counsel for Petitioner for the production of statements, given to police by two (2) eyewitnesses called by the Commonwealth, to

be used for cross-examination and impeachment (TR 82-84; 125). Defense counsel, citing the case of *Jencks* v. *United States,* 353 U.S. 657 (1957), argued that Petitioner had the right to view these statements under the rules stated in that case (TR 82-84, Appendix C, *infra,* p. App. 3). The motions were denied (TR 84; 125).

Petitioner's contention that he had the right to the production of the statements for use in cross-examination was presented to the Supreme Court of Virginia in his Notice of Appeal and Assignments of Error and his Petition for Appeal and Supersedeas. The Petition was refused (Appendix B, p. App. 2).

REASONS FOR GRANTING THE WRIT

The denial of the right of a defendant in a criminal case to the production and inspection of prior statements of prosecution witnesses to be used by the defendant for the purposes of cross-examination and impeachment of those witnesses is a denial of one of the basic elements of a fair trial, and, therefore, is a deprivation of liberty without the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This Court has never decided the question of whether the due process clause of the Fourteenth Amendment requires the production of statements of prosecution witnesses for use by the defense in a criminal trial in a state court. In the case of *Jeneks* v. *United States,* 353 U.S. 657 (1957), involving a criminal trial in a federal court, the Court held that the defendant was entitled to have statements of government witnesses produced at the trial for inspection and use in cross-examination and for the impeachment of these witnesses. It was further held that it was error for a federal trial court to require that defendant be able to show some

inconsistency between the witness' statement and his testimony at trial before production would be required.

While it is generally recognized, and was acknowledged by this Court in *Palermo* v. *United States,* 360 U.S. 343 (1959), that the decision in *Jencks* was not based on principles of constitutional law, but was founded in the Court's power to prescribe procedures for the administration of justice in the federal courts, members of the Court have recognized that constitutional principles lay just under the surface of that opinion. Thus, in *Palermo,* Mr. Justice Brennan, in a concurring opinion joined in by Chief Justice Earl Warren, Mr. Justice Black and Mr. Justice Douglas, stated:

> "It is true that our holding in *Jencks* was not put on constitutional grounds for it did not have to be; but it would be idle to say that the commands of the Constitution were not close to the surface of the decision; . . ."

With this in mind, it becomes clear that the underlying principle of the *Jencks* opinion is one of fundamental fairness to the accused in a criminal trial ensuring that he will have ample opportunity to defend himself. This is just the kind of fundamental fairness required by the Fourteenth Amendment.

This underlying constitutional principle becomes more important when considered in the light of the recent developments in the area of the suppression of evidence by the prosecution in criminal trials. In *Brady* v. *Maryland,* 373 U.S. 83 (1963), this Court held that, in a state criminal prosecution, the suppression, by the prosecution, of evidence favorable to the accused violates due process. It was further held that such suppression is error regardless of the good or bad faith of the prosecution. Therefore, a criminal defendant now has a constitutional right to the production of

any material evidence in the hands of the prosecution which might be exculpatory to him.

If the *Brady* rule is to be fully effective, then provision must be made for defendant to have access to prosecution evidence material to his defense. The protection of a right guaranteed by the Constitution should not be left to the fortuitous chance that the accused may discover the existence of such evidence at some date after trial.

Certainly, statements previously given by prosecution witnesses covering the same events testified to at trial and indicating the guilt of the accused are material evidence. Just as certainly, such statements may contain materials favorable to the accused if made available to the defense. As was noted by the Court in *Jencks:*

> "Because only the defense is adequately equipped to determine the effective use for the purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must be initially entitled to see them (statements of witness) to determine what use may be made of them. Justice requires no less. . . ."

Due process, with its fundamental concept of providing a fair and impartial hearing for one accused of a crime requires that such a statement be made available to the defense. There can be no interest of the state, the protection of which is paramount in importance to such a basic right.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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